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6 UNITED STATES DISTRICT COURT  
7 DISTRICT OF NEVADA

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9 JERRY WHITE,

10 Petitioner,

11 v.

12 HAROLD WICKHAM, et al.,

13 Respondents.

Case No. 3:04-cv-00412-GMN-VPC

ORDER

14 This counseled habeas petition comes before the Court on respondents' motion to  
15 dismiss (ECF No. 107). Petitioner has opposed (ECF No. 113), and respondents have  
16 replied (ECF No. 119).

17 In this action, petitioner challenges his state court convictions of one count of first-  
18 degree murder with use of a deadly weapon, one count of conspiracy to commit robbery,  
19 and one count of robbery with use of a deadly weapon. (ECF No. 103). Petitioner asserts  
20 a single claim: He is actually innocent. (*Id.*) Respondents move to dismiss the petition  
21 on the grounds that it is untimely, that it is procedurally defaulted, and that it does not  
22 state a claim upon which relief can be granted.

23 **I. Background**

24 On October 8, 1999, Ramon Navarro was murdered in his Elko home. Petitioner  
25 and his friend, Michael Woomer, were arrested and charged with the offense.

26 When first questioned by police, Woomer claimed that petitioner murdered  
27 Navarro. (Ex. 3).<sup>1</sup> He told police that petitioner and Navarro had been engaging in sexual

28 <sup>1</sup> The exhibits cited in this order are located at ECF Nos. 72 and 99.

1 conduct in the bedroom when petitioner suddenly began beating Navarro with a baseball  
2 bat and demanding money. (*Id.*) Petitioner turned himself in and told police that it was  
3 Woomer who robbed and killed Navarro while petitioner was passed out in another room.  
4 (Ex. 4).

5 Woomer accepted a plea deal and agreed to testify against petitioner. (Ex. 6).  
6 Shortly after entering his change of plea, Woomer met with police again. On the second  
7 telling, the details of Woomer's story changed. This time, it was Woomer and Navarro  
8 who had been engaging in sexual acts. After they stopped and Woomer smoked some  
9 marijuana, Woomer became ill and ran to the bathroom to throw up. Woomer emerged  
10 from the bathroom to find petitioner beating Navarro with a bat and demanding money.  
11 (Ex. 5).

12 At trial, Woomer essentially refused to testify, claiming both that he did not  
13 remember anything and acknowledging that he was afraid of what could happen to him  
14 in prison if he were labeled a snitch. (Ex. 10 (Tr. 4-46)). Woomer also stated that much  
15 of his second statement to the police was fabricated, using information he learned from  
16 studying the crime scene evidence. (*Id.* at 34-43). Despite Woomer's refusal to testify,  
17 his statement was effectively read into trial twice. (Ex. 11 at 49-80, 110-42).

18 The forensic evidence at trial established that Navarro's blood was on both  
19 petitioner's and Woomer's shoes and on Woomer's jacket, which had been found in  
20 petitioner's car. (Ex. 9 (Tr. 173)). DNA likely belonging to Woomer was found under  
21 Navarro's fingertips. (*Id.* at 178-80, 185).

22 At the conclusion of trial, the jury found petitioner guilty of first-degree murder with  
23 use of a deadly weapon, conspiracy to commit robbery, and robbery with use of a deadly  
24 weapon. (See Ex. 2). Petitioner was acquitted of conspiracy to commit murder. Petitioner  
25 was sentenced to consecutive terms of life in prison without the possibility of parole for  
26 the murder and deadly weapon charge and shorter concurrent sentences on the robbery  
27 charges. (*Id.*) Woomer, who entered a plea of guilty, was sentenced to a term of life with  
28 the possibility of parole after twenty years.

1           Petitioner thereafter pursued his appeal, a state post-conviction petition, and a  
2       federal habeas petition in this action. At each stage, petitioner's claims were denied.

3           On September 11, 2009, Woomer wrote and signed a declaration recanting his  
4       earlier accusations against petitioner and accepting full and sole responsibility for the  
5       murder and robbery of Ramon Navarro. (Ex. 1). Based on the recantation, petitioner on  
6       October 14, 2009, filed an application for leave to file a second or successive petition,  
7       which the Ninth Circuit Court of Appeals granted. (ECF No. 69). Petitioner thereafter  
8       filed his successor petition for writ of habeas corpus in this case. (ECF No. 75).

9           This action was reopened and then stayed pending petitioner's exhaustion of his  
10      actual innocence claim in state court. (ECF No. 91). On petitioner's return to state court,  
11      he presented his actual innocence claim alongside four other claims. (Ex. 34). The state  
12      trial court found the four additional claims procedurally defaulted and denied the actual  
13      innocence claim on the merits. (Ex. 49). On appeal, the Nevada Supreme Court affirmed.  
14      (Ex. 58).

15          Petitioner returned to federal court and filed an amended successor petition, which  
16      is the operative petition in this case. (ECF No. 103). Respondents now move to dismiss  
17      the petition primarily on the grounds that no freestanding claim of actual innocence exists.  
18      (ECF NO. 107). Respondents additionally argue, however, that the petition is also  
19      untimely and procedurally defaulted. (*Id.*)

## 20      **II.     Actual Innocence**

21          The sole claim asserted in the petition is that petitioner is actually innocent of  
22      murdering Ramon Navarro. The parties agree that the Supreme Court has not decided  
23      whether there is a freestanding claim of actual innocence under federal constitutional law.  
24      *McQuiggin v. Perkins*, 569 U.S. 383, 392 (2013). Given the open nature of the question,  
25      the Court concludes that it is more appropriately addressed in connection with the merits  
26      of petitioner's claim. Respondents' motion to dismiss the petition for failure to state a  
27      claim will therefore be denied without prejudice to renewing the argument in the answer  
28      to the petition.

1     **III.     Timeliness**

2             Pursuant to 28 U.S.C. § 2244(d)(1) a one-year statute of limitations applies to  
3     petitions filed under § 2254. The limitation period begins to run from the latest of

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5             (A) the date on which the judgment became final by the conclusion of direct  
6             review or the expiration of the time for seeking such review;

7             (B) the date on which the impediment to filing an application created by  
8             State action in violation of the Constitution or laws of the United States is  
9             removed, if the applicant was prevented from filing by such State action;

10            (C) the date on which the constitutional right asserted was initially  
11            recognized by the Supreme Court, if the right has been newly recognized  
12            by the Supreme Court and made retroactively applicable to cases on  
13            collateral review; or

14            (D) the date on which the factual predicate of the claim or claims presented  
15            could have been discovered through the exercise of due diligence.

16            Respondents argue that the petition in this case is untimely because it was filed  
17     more than a year after petitioner's judgment became final. Petitioner argues that the  
18     petition is timely pursuant to § 2244(d)(1)(D) because it was filed within one year of  
19     Woomer's recantation, which provided the factual predicate for his claim of actual  
20     innocence. Respondents argue that the factual predicate of petitioner's claim – that he  
21     is innocent and that Woomer committed the crime – has always been known to him and  
22     that Woomer's recantation is merely new evidence in support of that old claim.

23            The Court agrees with petitioner that the factual predicate of his claim is Woomer's  
24     recantation because the recantation is different in substance from Woomer's prior  
25     statements to police and his testimony at trial and no due diligence could have produced  
26     the recantation earlier. *See In re McDonald*, 514 F.3d 539, 545 (6th Cir. 2008). *Cf. King*  
27     *v. Trujillo*, 638 F.3d 726, 731 (9th Cir. 2011) (recantation was not a new factual predicate  
28     because it was essentially the same as the statements presented at trial). Importantly,  
   Woomer's recantation claims that petitioner had no involvement in the murder or robbery.  
   Petitioner filed his successor petition within one year of Woomer's recantation. The  
   instant petition is therefore timely.

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#### 1     **IV.     Procedural Default**

2             Respondents argue that petitioner's claim is procedurally defaulted because the  
3     Nevada Supreme Court concluded that it was procedurally barred.

4             A federal court cannot review a petitioner's claim "if the Nevada Supreme Court  
5     denied relief on the basis of 'independent and adequate state procedural grounds.'" *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003). In *Coleman v. Thompson*, the  
6     Supreme Court held that a state prisoner who fails to comply with the state's procedural  
7     requirements in presenting his claims is barred from obtaining a writ of habeas corpus in  
8     federal court by the adequate and independent state ground doctrine. *Coleman v.*  
9     *Thompson*, 501 U.S. 722, 731-32 (1991). A state procedural bar is "adequate" if it is  
10    "clear, consistently applied, and well-established at the time of the petitioner's purported  
11    default." *Calderon v. United States District Court (Bean)*, 96 F.3d 1126, 1129 (9th Cir.  
12    1996). A state procedural bar is "independent" if the state court "explicitly invokes the  
13    procedural rule as a separate basis for its decision." *Yang v. Nevada*, 329 F.3d 1069,  
14    1074 (9th Cir. 2003). A state court's decision is not "independent" if the application of the  
15    state's default rule depends on the consideration of federal law. *Park v. California*, 202  
16    F.3d 1146, 1152 (9th Cir. 2000).

17            As noted above, the state trial court addressed petitioner's actual innocence claim  
18    on the merits while denying the other claims as procedurally barred. The Nevada  
19    Supreme Court concluded that the state court properly denied petitioner's freestanding  
20    actual innocence claim. (Ex. 58 at 4-5) ("[W]e conclude that the district court did not err  
21    in denying appellant's freestanding claim of actual innocence in which he requested a  
22    new trial on the basis of newly discovered evidence (Woomer's recantation of his trial  
23    testimony)."). While the conclusion of its order broadly affirmed denial of the petition as  
24    "procedurally barred," (*id.* at 5), the parties did not argue on appeal that the actual  
25    innocence claim was procedurally barred, (see Exs. 55 & 56). In light of the trial court's  
26    order, the parties' briefs, and the Nevada Supreme Court's finding that the actual  
27    innocence claim lacked merit, the Court does not find the court's ambiguous statement in  
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1 the conclusion of its order to be a clear and express application of a procedural bar to the  
2 actual innocence claim. Petitioner's actual innocence claim is not, therefore, procedurally  
3 defaulted.

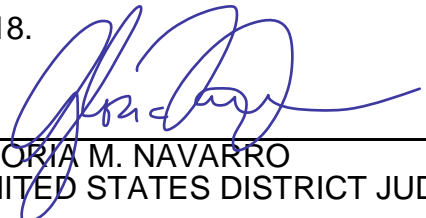
4 **V. Conclusion**

5 In accordance with the foregoing, IT IS THEREFORE ORDERED that  
6 respondents' motion to dismiss (ECF No. 107) is DENIED.

7 IT IS FURTHER ORDERED that respondents shall file an answer to the petition  
8 within sixty (60) days of date of entry of this order. Petitioner thereafter will have thirty  
9 (30) days within which to file a reply.

10 IT IS SO ORDERED.

11 DATED THIS 14 day of June, 2018.

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15 GLORIA M. NAVARRO  
16 UNITED STATES DISTRICT JUDGE  
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